

PROPOSED FINAL FORM (Clean Draft)
RTO WEST TARIFF DISPUTE RESOLUTION PROVISIONS

13. Dispute Resolution

13.1 Applicability.

13.1.1 **General Applicability.** The provisions of this Section 13 shall apply to all disputes that arise under RTO West Tariff, except: (i) as limited by law (including the rights of any party to file a complaint with FERC under the relevant provisions of the FPA); and (ii):

(a) disputes arising under Non-Converted Transmission Agreements, except as the disputing parties may otherwise agree;

(b) disputes as to whether the rates, charges, terms, or conditions of the RTO West Tariff are just and reasonable under the FPA, which shall be presented directly to FERC for resolution, except as the disputing parties may otherwise agree; and

(c) applications, petitions, or complaints seeking changes to the rates, charges, terms, or conditions of the RTO West Tariff or changes to any Service Agreement entered into under the RTO West Tariff, which shall be presented directly to FERC for resolution; and

(d) disputes that the parties agree to resolve through means other than under RTO West Tariff Section 13, including presenting the matter directly to FERC for resolution.

13.1.2 **Injunctive Relief.** Where a court so determines, use of the procedures under RTO West Tariff Section 13 shall not be a condition precedent to a court action for injunctive relief.

13.2 Initiation of Arbitration.

[NTD: We have not yet figured out whether there should be a fast-track ADR procedure and to what issues it should apply.]

13.2.1 **Demand for Arbitration.** An Eligible Customer or RTO West may initiate arbitration by serving its demand for arbitration to the other disputing Parties and the RTO West ADR Committee, which shall publish notice of the demand on the RTO West Website and by any other method the RTO West ADR Committee specifies.

[NTD: We envision that the “RTO West ADR Committee” would be balanced and consist of representatives of the various stakeholder groups and of RTO West – constituted either under the RTO West Bylaws or some other appropriate document.]

13.2.2 Statement of Claim. Absent an agreement, RTO West or Transmission Customer(s) shall, within 15 days after serving an arbitration demand under Section 13.2.1, serve a written statement of claim to each other disputing Party and the RTO West ADR Committee, which shall initiate the provisions of RTO West Tariff Section 13. The Parties may agree to delay the commencement of arbitration to attempt to resolve their dispute through good-faith negotiations or mediation or for any other reason. The statement of claim shall set forth in reasonable detail (i) each claim, (ii) the relief sought (iii) a summary of the grounds for such relief and the basis for each claim, and (iv) the Parties to the dispute. Each other Party to the dispute shall deliver its response (including identification of any additional necessary Parties) within 15 days following receipt of the initial statement of claim or such longer period as the RTO West ADR Committee may permit following an application by the responding Party. If any responding Party wishes to submit a counterclaim with its response to the initial statement of claim, the responding Party shall include the counterclaim in its response. Where a responding Party includes a counterclaim the initiating Party may respond to that counterclaim within 15 days following receipt of the counterclaim. Any Party named in a statement of claim that does not respond to the claim within the period specified in this Section 13.2.2 shall be deemed to have denied each claim against it. RTO West shall publish the statements of claim, responses, and any counterclaims on the RTO West Website and by any other method the RTO West ADR Committee specifies.

13.3 Arbitration Process.

13.3.1 Selection of Arbitrator.

13.3.1.1 Selection of a Single Arbitrator. Within 10 days following submission of responding Parties' responses and counterclaims, the Parties shall select an arbitrator familiar with and knowledgeable about electric utility matters, including electric transmission and bulk power issues and related regulatory requirements. If the Parties cannot agree upon an arbitrator, or do not agree on a means of selecting an arbitrator that differs from that set forth in this Section 13.3.1, the Parties shall take turns striking names from a list of 10 qualified individuals supplied by the RTO West Arbitration Committee from its standing list, with a Party chosen by lot first striking a name. The last remaining name not stricken shall be designated as the arbitrator. If that individual is unable or unwilling to serve (or, if a Party objects to the arbitrator serving on the basis of a disclosure under Section 13.3.2.1 within five days of that disclosure), the individual last stricken from the list shall be designated and the process repeated until an individual is selected who is able and willing to serve. If a Party issuing or named in a statement of claim served under Section 13.2.2 does not participate in the selection of an arbitrator within the time period specified under this Section 13.3.1.1, the remaining Parties have the right select the arbitrator without that Party.

13.3.1.2 Party Option to Obtain Three Arbitrator Panel. As an alternative to selecting one arbitrator under Section 13.3.1.1, any Party may elect to constitute a three-member arbitration panel, and the other Party or Parties shall cooperate in the selection of the panel, subject to the following conditions:

(a) Any Party or Parties so electing shall be responsible for five-sixths (5/6) of the costs of the arbitration (exclusive of each Party's individual costs and attorneys' fees), regardless of the outcome of the arbitration, unless the disputing Parties agree to an alternate method of allocating costs. The remaining one-six (1/6) of the costs shall be allocated to the Party (or allocated in equal parts among the Parties) that did not participate in the election to use a three arbitrator panel.

(b) Each arbitrator shall be subject to the requirements of Section 13.3.2.

(c) Unless otherwise agreed by the Parties, the three arbitrators shall be selected in the following manner: (i) the RTO West Arbitration Committee shall provide to the Parties a list of 15 qualified individuals from its standing list; (ii) the Parties shall take turns striking names from the list, with a Party chosen by lot first striking a name; and (iii) the three remaining names not stricken shall constitute the arbitration panel.

(d) The arbitration panel shall decide all matters by majority vote.

(e) All other procedures, rights and obligations set out in this Section 13 shall apply to the arbitration, and all references to the "arbitrator" also shall be deemed a reference to the three-member arbitration panel so chosen.

13.3.1.3 *Communication with Candidates to Serve as Arbitrator.* No Party and no one acting on behalf of any Party shall communicate unilaterally concerning the arbitration with any potential arbitrator identified on the list provided by the RTO West Arbitration Committee.

13.3.1.4 *Arbitrator's Jurisdiction.* The arbitrator shall have the power to rule on his or her own jurisdiction.

13.3.2 Disclosures Required of Arbitrators.

13.3.2.1 *Initial Disclosure Obligation.* The designated arbitrator(s) shall be required to disclose to the Parties any direct financial or personal interest in the outcome of the arbitration. The designated arbitrator shall be required to disclose any additional interests, relationships, facts, or circumstances including, without limitation:

- (a) any existing or past financial, business, or professional interest or employment;
- (b) any relationship he or she has with any Party or its counsel, or with any individual whom they have been told will be a witness; and
- (c) any family or personal relationship

where they are likely to affect the arbitrator's impartiality or might reasonably create an appearance of bias. All designated arbitrators shall make a reasonable effort to inform themselves of any interests or relationships described above.

13.3.2.2 *Ongoing Disclosure Obligations.* The obligation to make disclosure in accordance with Section 13.3.2.1 is a continuing duty. If, after initiation of an arbitration under RTO West Tariff Section 13, the arbitrator must make a disclosure in accordance with Section 13.3.2.1, the arbitrator shall, at the time of disclosure, determine whether the information disclosed is grounds to disqualify the arbitrator from continuing with the arbitration. If the arbitrator determines that he or she is disqualified from continuing with the arbitration, the Parties shall select a new arbitrator in accordance with Section 13.3.1.

13.3.3 **Arbitration Procedures.**

13.3.3.1 *Procedural Rules.* The arbitration shall be conducted in accordance with the Arbitration Procedural Rules. *[NTD: The Arbitration Procedural Rules will be based on AAA Commercial Rules of Arbitration and provided in initial form to the ADR Committee; the definition will also recognize that the ADR Committee can modify these rules from time to time.]* The Arbitration Procedural Rules shall conform to the requirements specified in RTO West Tariff Section 13, and in any case where there is a conflict RTO West Tariff Section 13 will govern. Except as otherwise provided in RTO West Tariff Section 13, all participants in the arbitration shall be bound by such procedures.

13.3.3.2 *Communication with Arbitrator.* No Party or Participant and no one acting on behalf of any Party or Participant shall communicate unilaterally concerning the arbitration with the arbitrator. Unless the Parties agree otherwise or the arbitrator so directs, any communication from the Parties to the arbitrator shall also be sent to all other Parties and to the RTO West Arbitration Committee.

13.3.4 **Modification of Arbitration Procedures.** The Parties may, by agreement of all the Parties, modify the application of the Arbitration Procedural Rules for purposes of their specific dispute. Except where the terms of RTO West Tariff Section 13 specifically provide otherwise, the Parties may not agree to modify any of the provisions set forth in RTO West Tariff Section 13.

13.3.5 **Rights Relating to Intervention**

13.3.5.1 *Time for Intervention.* Any Eligible Customer not named as a Party in a statement of claim initiating an arbitration as provided in section 13.2.2 or in a counterclaim submitted in response thereto may apply to intervene in the arbitration as a Party or Participant within 30 days from publication of the statement of claim. Any Member that is not an Eligible Customer and is not named as a Party in a statement of claim initiating an arbitration as provided in section 13.2.2 or in a counterclaim submitted in response thereto may apply to intervene in the arbitration as a Participant within 30 days from publication of the statement of claim. Late intervention may be permitted in the arbitrator's discretion for good cause shown subject to the condition that a late-intervening Party or Participant must (i) accept the record as

established prior to the intervention, including without limitation any procedural or substantive rulings or orders, (ii) proceed in accordance with any established schedule, (iii) pay a share of the costs of arbitration as determined by the arbitrator taking into account, among other things, the differing procedural rights of Parties and Participants and the stage of the arbitration when intervention is sought, and (iv) must not cause a conflict of interest for the arbitrator objectionable to any existing Party.

13.3.5.2 *Application and Order.* An application to intervene shall be served on the Parties and the RTO West ADR Committee. Any such application shall state whether intervention is sought as a Party or a Participant and shall demonstrate the applicant's satisfaction of the criteria stated in Section 13.3.5.4 below. Any objection by a Party to the intervention request must be filed with the arbitrator(s), if an arbitrator has been selected, and served upon the applicant, the Parties and the RTO West ADR Committee, within 10 days of service of the application. Promptly upon selection of the arbitrator pursuant to Section 13.3.1, the arbitrator will issue an order determining whether, based upon the criteria established by Section 13.3.5.4 below, any Eligible Customer or Member that has timely filed an application pursuant to Section 13.3.5.1 may intervene in the arbitration.

13.3.5.3 *Intervenor Status and Rights of an Intervening Party.* The arbitrator's order responding to an application to intervene shall, upon the requisite showing as established by Section 13.3.5.4 below, grant an Eligible Customer Party status in the arbitration with full rights and responsibilities in relation to all other Parties, provided that the arbitrator may condition the Eligible Customer's Party status as necessary to assure that the rights of other Parties are not unduly prejudiced or that the arbitration is not unduly delayed. Alternatively, the arbitrator's order responding to an application to intervene may give the Eligible Customer or Member Participant status in the arbitration, upon the requisite showing as established by Section 13.3.5.4 below. If intervention is granted to an Eligible Customer or Member as a Participant only, the arbitrator's order shall contain any limitations on participation additional to those stated in Section 13.3.5.5 below. The arbitrator shall deny all other applications for intervention.

13.3.5.4 *Requisite Showing.* Subject to the provisions of Sections 13.3.5.1 and 13.3.5.3, (A) an Eligible Customer shall be permitted to intervene as a Party upon a showing that (i) the Eligible Customer has an interest relating to the property or the transaction that is the subject of the arbitration, (ii) the Eligible Customer is so situated that the disposition of the matter subject to arbitration may as a practical matter impair or impede the Eligible Customer's ability to protect that interest, and (iii) no existing Party adequately represents the Eligible Customer's interest; and (B) a Member or an Eligible Customer that does not satisfy the requirements of subsection (A) above shall be permitted to intervene as a Participant upon a showing that it has a commercial or other material interest in the issues raised or outcome of the proceeding.

13.3.5.5 *Participants' Rights.* Subject to further limitations imposed by the arbitrator as may be required to assure that the rights of Parties or other Participants are not unduly prejudiced or that the arbitration is not unduly delayed, and except as provided in

Section 13.3.5.6 below, Participants' rights to participate in the arbitration shall be only as specified in this Section 13.3.5.5. Participants:

- (a) must be timely served by the Parties with copies of all pleadings;
- (b) have the right to file written post-hearing comments; and
- (c) may attend hearings conducted by the arbitrator, but shall not otherwise participate in the hearings except as provided in Section 13.3.5.6 below.

Participants must serve their comments upon each Party and Participant according to a procedural schedule to be established by the arbitrator. Participants' comments may be considered by the arbitrator in reaching decision on any issue; provided, however, that comments shall not constitute evidence in the proceeding except to the extent they contain information that, in the arbitrator's opinion, is within the scope of judicial notice.

13.3.5.6 Additional Participants' Rights. For good cause shown, the arbitrator may allow one or more of the Participants, or designated groups of Participants with common interests to: (i) file expert testimony on one or more specifically-identified discrete issues, (ii) cross examine one or more witnesses on such issue(s); (iii) submit briefs on such issue(s); and (iv) participate in oral argument on such issue(s). Any such expert testimony or testimony obtained by cross-examination shall be treated as evidence on the same basis as the Parties' testimony. As used in this Section 13.3.5.6, "good cause" means that

- (a) the Participant(s) has made a showing that its interests are likely to be adversely affected by the resolution of an issue in a manner advocated by a Party;
- (b) no Party's interest is reasonably aligned with the Participant(s) interest;
- (c) the Participant(s) will present evidence or argument helpful to the determination of an issue;
- (d) the Participant(s) agrees to pay an increased share of the arbitration costs as mutually agreed by the Participant(s) and Parties or as determined by the arbitrator at the conclusion of the arbitration; and
- (e) the Participant(s)' additional participation will not expand the scope of or unduly delay the proceedings.

13.3.6 Timetable. Promptly after the appointment of the arbitrator, the arbitrator shall set a date for the issuance of the arbitration decision, which shall be no later than six months (or such date as the Parties and the arbitrator may agree) from the date of the appointment of the arbitrator, with other dates, including the dates for an evidentiary hearing or other final submissions of evidence, set in light of this date. The date for the evidentiary hearing or other final submissions of evidence shall not be changed absent extraordinary circumstances. The arbitrator shall have the power to impose sanctions, including dismissal of the proceeding, for dilatory tactics or undue delay in completing the arbitration proceedings.

13.3.7 Discovery Procedures. The Arbitration Procedural Rules shall include adequate provision for the discovery of relevant facts, including the taking of testimony under oath, production of documents and other things, the presentation of evidence, the taking of samples, conducting of tests, and inspection of land and tangible items. The nature and extent of such discovery shall take into account (i) the complexity of the dispute, (ii) the extent to which facts are disputed, (iii) the extent to which the credibility of witnesses is relevant to a resolution, (iv) the need to provide fair access to information by all Parties where information may be obtained under statutory right by one or more Parties from another Party or Parties outside the discovery process, and (v) the amount in controversy. The forms and methods for taking such discovery shall be as described in the Federal Rules of Civil Procedure, except as modified by agreement of the Parties.

13.3.8 Confidentiality. The Arbitration Procedural Rules shall provide a means for protecting confidential information disclosed in the course of an arbitration under this Section 13.

13.3.9 Summary Disposition. The Arbitration Procedural Rules shall provide a means for summary disposition of an arbitration proceeding under this Section 13. The arbitrator may grant summary disposition of the proceeding, in whole or in part, if there is no genuine issue of fact material to the decision. Any uncontroverted fact established through summary disposition shall be deemed established for the remainder of the proceeding. Any grant of summary disposition under this Section 13.3.9 is subject to appeal pursuant to Section 13.4 after the final award in the proceeding has been issued.

13.3.10 Evidentiary Hearing. The Arbitration Procedural Rules shall provide for an evidentiary hearing with respect to matters not resolved through summary disposition under Section 13.3.9 above, unless all Parties consent to the resolution of the matter on the basis of a written record. Hearing rules shall include provision for the cross-examination of witnesses

13.3.11 Evidence. The Arbitration Procedural Rules shall include provisions addressing submission and admissibility of evidence. The arbitrator shall compile a complete evidentiary record of the arbitration, which, upon completion, shall be available to any Party at that Party's request.

13.3.12 **Award.**

13.3.12.1 *Award Based on Arbitrator's Decision.* Except as provided below with respect to “baseball” style arbitration, the arbitrator shall issue written reasons for the award, including findings of fact and law. The arbitration award shall be based on (i) the evidence in the record, (ii) the terms of the RTO West Tariff, (iii) applicable United States federal law, regulations, treaties, and agreements, and any relevant FERC decisions or then-applicable FERC standards or policies, (iv) other applicable law, and (v) consideration of relevant awards in previous arbitration proceedings decided under this Section 13.3.12.1 [or under Section 13.3.1.21 of the BC IGO Tariff]*. The arbitrator may, but need not, treat previous awards under this Section 13.3.12.1 as determinative. A summary of the disputed matter and the arbitrator's award shall be published on the RTO West Website and by any other method the RTO West ADR Committee specifies. The RTO West Office of General Counsel shall maintain a copy of the complete award and written explanation.

*[*NTD – We need to talk and think through issues of coordinating between RTO West Tariff and BC IGO Tariff.*]

13.3.12.2 *Award Based on “Baseball” Style Arbitration.* In arbitration conducted “baseball” style, the arbitrator shall issue written reasons for adopting one of the awards proposed by the Parties. The arbitrator's choice among the proposed awards shall be based on (i) the evidence in the record, (ii) the terms of the RTO West Tariff, (iii) applicable United States federal law, regulations, treaties, and agreements and any relevant FERC decisions or then-applicable FERC standards and policies, (iv) other applicable law, and (v) consideration of relevant awards in previous arbitration proceedings decided under Section 13.3.12.1 [or under Section 13.3.1.21 of the BC IGO Tariff]*. If the arbitrator concludes that none of the proposed awards are consistent with the factors enumerated in (i) through (v) above, or address all of the issues in dispute, the arbitrator shall specify how each proposed award is deficient and direct that the Parties submit new proposed awards that cure the identified deficiencies. A summary of the disputed matter and the arbitrator's award shall be published on the RTO West Website and by any other method the RTO West ADR Committee specifies. An award under this Section 13.3.12.2 shall not be considered and may not be cited in any other proceeding.

13.3.12.3 Where a panel of arbitrators is appointed pursuant to Section 13.3.1.2, a majority of the arbitrators must agree on the decision.

13.3.13 **Remedies.**

[*NTD – We need to think through how to retain a “level playing field” as much as possible – for example, if some remedies that could be imposed on nongovernmental parties might not apply, because of statutory provisions, to governmental parties*] two kinds of problems – (1) limitations that can be waived; and (2) laws about which the affected party does not have the ability to choose – **we think maybe an approach that could be a fair balance** would be for: (a) parties to agree, as a condition of service, to waive any limitations they have authority to waive and (b) to require the arbitrator to limit awards to only those they could be awarded against any Party to the arbitration

13.3.13.1 *Arbitrator's Discretion.* The arbitrator shall have discretion to grant the relief sought by a Party, or determine such other remedy as is appropriate, unless the Parties agree to conduct the arbitration "baseball" style. [Except as limited by law]*, the arbitrator shall have the authority to award any remedy or relief available from FERC or any court of competent jurisdiction. Where the RTO West Tariff leaves any matter to be agreed between the Parties at some future time and provides that in the absence of agreement the matter shall be resolved in accordance with RTO West Tariff Section 13, the arbitrator shall have authority to decide upon the terms of the agreement that, in the arbitrator's opinion, it is reasonable that the Parties should reach, having regard to the other terms of the RTO West Tariff and the arbitrator's opinion as to what is fair and reasonable in all the circumstances.

13.3.13.2 *"Baseball" Arbitration.* If the Parties agree to conduct the arbitration "baseball" style, the Parties shall submit to the arbitrator and exchange with each other their last best offers in the form of the award they consider the arbitrator should make, not less than seven days in advance of the date fixed for the hearing, or such other date as the arbitrator may decide. If a Party fails to submit its last best offer in accordance with this Section 13.3.13.2, that Party shall be deemed to have accepted the offer proposed by the other Party. The arbitrator shall be limited to awarding only one of the proposed offers and may not determine an alternative or compromise remedy.

13.3.14 **Costs.** Except as otherwise provided in Section 13.3.1.2, the costs of the time, expenses, and other charges of the arbitrator shall be borne by the Parties to the dispute, with each Party on an arbitrated issue bearing its pro-rata share of such costs, and each Party to an arbitration proceeding bearing its own costs and fees. If the arbitrator determines that a demand for arbitration or response to a demand for arbitration was made in bad faith [NTD – consider whether bad faith is too limited a basis for cost shifting?], the arbitrator shall have discretion to award the costs of the time, expenses, and other charges of the arbitrator to the prevailing Party. Participants' obligations to share in costs of any arbitration under this Section 13 shall be as determined by the arbitrator in accordance with Sections 13.3.5.1 and 13.3.5.6.

13.3.15 **Compliance.** Unless the arbitrator's decision is appealed under Section 13.4, the disputing Parties shall, upon receipt of the decision, immediately take whatever action is required to comply with the award to the extent the award does not require regulatory action. An award that is not appealed shall be deemed to have the same force and effect as an order entered by FERC or any court of competent jurisdiction.

13.3.16 **Enforcement.** Following the expiration of the time for appeal of an award pursuant to Section 13.4.3, any Party may apply to FERC or any court of competent jurisdiction for entry and enforcement of judgment based on the award.

13.4 Appeal of Award.

13.4.1 **Basis for Appeal.** A Party may apply to FERC to hear an appeal of an arbitration award upon the grounds that: (i) the arbitrator's decision is contrary to applicable law

or regulation (including without limitation the FPA or FERC's then-applicable standards or policies); (ii) the arbitrator's decision is arbitrary and capricious; (iii) the arbitrator failed to afford one or more Parties to the dispute an opportunity for a fair and meaningful hearing; (iv) the arbitrator engaged in material misconduct in connection with the arbitration; (v) the arbitrator exceeded the authority conferred upon him or her under RTO West Tariff Section 13 or as otherwise established by agreement of all the Parties; or (vi) the arbitrator's decision is contrary to the provisions of Section 13.3.12. Where there is concurrent jurisdiction between a court of competent jurisdiction and FERC, the Party shall appeal to FERC. Where FERC does not have jurisdiction, a Party may appeal to a court of competent jurisdiction on any grounds provided by law. A Participant may appeal the arbitrator's findings with respect to issues on which the Participant was allowed to present evidence pursuant to Section 13.3.5.6.

13.4.2 Appellate Record. The arbitration provisions of RTO West Tariff Section 13 contemplate that FERC or the court of competent jurisdiction should afford substantial deference to the factual findings of the arbitrator. No Party shall seek to expand the record before FERC or the court of competent jurisdiction beyond that assembled by the arbitrator, except (i) by making reference to legal authority that did not exist at the time of the arbitrator's decision, or (ii) if such Party contends the decision was based upon or affected by fraud, collusion, corruption, misconduct or misrepresentation.

13.4.3 Procedures for Appeals. Appeals shall, unless otherwise ordered by FERC or the court of competent jurisdiction, conform to the procedural limitations set forth in this Section 13.4.3.

13.4.3.1 Notice. If a Party or Participant to an arbitration desires to appeal an award, it shall provide notice of appeal to the RTO West Board of Directors, all Parties and Participants, and the arbitrator within 14 days following the date of the award. The appealing Party or Participant must likewise provide notice to the RTO West ADR Committee, which shall publish notice of the appeal on the RTO West Website and by other method the RTO West ADR Committee specifies. Within 10 days of the filing of the notice of appeal, the appealing Party or Participant must file an appropriate application, petition or motion with FERC to trigger review under the FPA or with a court of competent jurisdiction. Such filing shall state that the subject matter has been the subject of an arbitration under RTO West Tariff Section 13.

13.4.3.2 Evidentiary Record. Within 30 days of filing the notice of appeal (or such period as FERC or the court of competent jurisdiction may specify) the appellant shall file the complete evidentiary record of the arbitration and a copy of the award with FERC or with the court of competent jurisdiction. The appellant shall serve copies of a description of all materials included in the submitted evidentiary record.

13.4.4 Award Implementation. Implementation of the award shall be deemed stayed pending an appeal unless and until, at the request of a Party, FERC or the court of competent jurisdiction to which an appeal has been filed issues an order dissolving, shortening, or extending such stay. RTO West shall publish a summary of each appeal on the RTO West Website and by other method the RTO West ADR Committee specifies.

13.4.5 Judicial Review of FERC Orders. FERC orders resulting from appeals shall be subject to judicial review pursuant to the FPA.